



Arkansas
Secretary
Of State

Charlie
Daniels

The Arkansas Register



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ATTORNEY GENERAL OPINIONS

Opinion No.: 2003-017

Jeffress, Jimmy
State Senator

RE:If members of a school district's Personnel Policy Committee ("PPC") are elected in accordance with the school's policy which provides that teachers in each school building in the district must select a classroom teacher representative to be voted on by all the teachers in the district, have they been elected in accordance with ACA 6-17-203(b)? Q2) If the school district has, through its board of directors, adopted a policy required that the teachers in each building select a classroom teacher to be placed on the ballot as stated above, must this policy be followed by the teachers or are the classroom teachers free to adopt whatever process they want for selecting teachers to be placed on a ballot and disregard the board's policy? Q3) Can the term of the member of the PPC be for greater than one year, or must there be a new election of all members of the Committee each school year? Q4) If a school district adopts a policy that provides for three-year rotating terms of the members of the PPC, do the classroom teachers have to follow this policy or can the PPC on its own determine the length of its members terms, regardless of what the formal school board policy is? Q5) If a school district adopted a policy that said it was the responsibility of the superintendent and the school administrators to see that the elections of the PPC are held, would this policy be in violation of ACA 6-17-203(b)? Q6) Do the provisions of this subchapter preclude a PPC from adopting its own set of guidelines exclusive of school board policy including, but not limited to, the election of its members, the filling of vacancies, or any other guideline not specifically addressed in this statute? **ANSWER:** The policies or procedures described under Q1 - 4 likely fall within the teachers' exclusive authority to conduct the election of classroom teachers to the PPC. The focus of Q5 is unclear. The answer to Q6 depends upon the specific guidelines. See *Hope Educ. Assoc. v. Hope School Dist.* And *Nathaniel v. Forrest City School Dist.* And Op. Nos. 98-028, 97-203, 95-372.

Opinion No.: 2003-019

Malone, Percy
State Senator

RE:Q1) Does the term "costs" as it is used in ACA 16-90-113(a) and (b) include warrant fees and/or mileage? Q2) Does the judge have discretion in including the costs in the judgment or are the costs mandatory? Q3) If the judge does not include the costs in a final judgment and the defendant fails to pay the costs, does the city have authority to bill the county treasurer for its costs? **RESPONSE:** Q1) Yes. Q2) The costs are mandatory, and the judge does not have discretion not to include them in the final judgment. Q3) No. The county can be held liable for these costs only if they were included in the judgment, the defendant has failed to pay, and execution has been issued against the defendant's property, and the defendant's property was insufficient to pay the costs. See ACA 16-92-101 et seq.

Opinion No.: 2003-022

Glover, Bobby L.
State Senator

RE:Would a video game of chance that simulates an electronic slot machine which has a bill acceptor but does not have an automatic money pay off mechanism and does not require a Federal Gaming Stamp, be considered a legal coin operated amusement device under Arkansas law if no cash or cash prizes are awarded? **ANSWER:** This question presents issues that are implicated in the appeal in *State v. Gaming Machines* (Sebastian Co. Cir. Ct.). I am therefore unable to issue an opinion at this time, based on the office's longstanding policy with respect to matters in litigation.

Opinion No.: 2003-023

Bond, Will
State Representative

RE:Does the Jacksonville Wastewater Utility Commission have authority to assess fees in the

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amount of \$36,000 to \$50,000 against the developer for a wastewater pump station that the developer has paid for and installed without City Council approval? RESPONSE: Declined to answer—too many undetermined factual issues.

Opinion No.: 2003-024

Billings, Carol
City Attorney

RE:Request for approval, pursuant to provisions of ACA 25-20-104, of the attached memorandum of understanding between the Pine Bluff Arsenal/ Chemical Activity and the Pine Bluff Police Department for mutual support between the two agencies. RESPONSE: It is not clear that the submitted document is intended to be an interlocal agreement. If it is intended to be one, approval is denied due to certain defects.

Opinion No.: 2003-031

Laverty, Randy
State Senator

RE:In the Lake View case, the Arkansas Supreme Court found ACA 26-80-204(18)(c) unconstitutional. What is the effect of this ruling on the state's school districts? Q2) Will those school districts that are not currently voting the required 25 mills for maintenance and operations be required to submit a proposed millage increase to their patrons at the September school board elections in order to reach the required millage level? Can this question be submitted to the patrons of a school district at a special election? Q3) What are the consequences for the failure of a school district to submit a millage increase for consideration by their patrons at either a special election of the September school board election? What are the consequences to the school district if the patrons of the district fail to approve such a millage request? Q4) Can the General Assembly pass legislation that would extend the time frame for school districts to submit proposed millage increases to their patrons for consideration to meet the requirements of the

Arkansas Supreme Court Lake View opinion? If not, why not? RESPONSE: Q1) Because the court found A.C.A. § 26-80-204(18)(c) unconstitutional, school districts can no longer credit excess debt service millages against the 25-mill property tax that Amendment 74 obligates them to devote to maintenance and operation of the schools. Q2) A.C.A. § 6-14-114(4)(D) requires a vote by school district electors at the regularly scheduled annual election on "[t]he total millage rate levied for all purposes in the school district — a figure that includes the uniform rate of tax. The answer to this question is consequently "yes": school districts will be obligated to submit for a vote the necessary millage to meet the uniform rate of tax as interpreted by the Arkansas Supreme Court. However, the uniform rate of tax is constitutionally mandated by Amendment 74, and the quorum court is consequently obligated to levy the tax regardless of the result of the vote. With respect to the second part of this second question, A.C.A. § 6-14-102(d) authorizes special school elections for the purposes of presenting debt service issues to the electorate and to levy additional mills over and above the uniform rate of tax. My inquiries reveal that in the wake of the Lake View opinion, various school districts have in fact scheduled special elections to consider debt restructuring in order to lower their total millages. I believe conducting such special elections is fully consistent with current law. Q3) Under Amendment 74 the quorum court has no choice but to levy the uniform rate of tax. Consequently, regardless of whether the issue is put to the voters, the quorum court in November must levy the constitutionally required 25-mill uniform rate of tax. This conclusion would apply even if district voters expressed disapproval of the uniform rate of tax. Q4) Amendment 74 precludes the General Assembly from enacting any legislation that would defer the annual levy of the 25-mill tax.

Opinion No.: 2003-032

Bookout, Jerry
State Senator

RE:If mobilization/manipulation are synonymous terms, then how would you interpret provisions of ACA

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17-93-102(6)(B)(i)(c)? Q2) If the above referenced statute were amended to define manual therapy as: "Manual therapy techniques, including soft tissue massage, manual traction, and connective tissue massage, therapeutic massage, mobilization and manipulation," how would this new amendment be interpreted? Q3) Are these two definitions only regarding the spine or does it involve all the joints in the body? What do you interpret as the spine? RESPONSE: I cannot opine on this matter because it is the subject of pending litigation.

Opinion No.: 2003-035

Broadway, Shane
State Representative

RE: If Benton School District voters do not approve at least 25 mills of maintenance and operations tax during 2003, how and when would the additional 13.5 mills of tax be assessed in order to comply with provisions of Ark. Const. amend. 74? RESPONSE: Ark. Op. Att'y Gen. No. 2003-031, issued simultaneously herewith, directly addresses this question. I do not consider school district voter approval a prerequisite to the imposition of the 25-mill tax. In my opinion, the voters have already imposed the tax by their adoption of Amendment 74. Although A.C.A. § 6-14-114(4)(D) requires a vote by school district electors on "[t]he total millage rate levied for all purposes in the school district — a figure that necessarily includes the 25-mill uniform rate of tax — I believe Amendment 74 requires imposition of the tax regardless of how school district members vote on the issue.

Opinion No.: 2003-036

Judy, Jan A.
State Representative

RE: Does millage assessed for police and fire pension authorized by Const. amend. 31 and/or city libraries authorized by Amend. 30, count against the 5 mill limit set by Ark. Const. art. 12, Sec 4? Q2) Since the city

(through the county) levies 0.8 mills for pensions and 1 mill for the city library, is Fayetteville constitutionally limited to 3.2 mills for all other purposes? RESPONSE: 1) No. 2) No.

Opinion No.: 2003-037

Snowden, Max
Exec Dir, AR Commission on Child Abuse

RE: Does Act 1452 of 2001 (ACA 12-9-113) apply to "specialized" law enforcement officers, e.g., adult probation and parole officers employed by the Department of Correction or others? RESPONSE: The act is unclear. The Commission on Law Enforcement Standards and Training is charged with enforcing the act and would not be acting outside its authority in declining to apply Act 1452's training requirements to specialized law enforcement officers.

Opinion No.: 2003-038

Broadway, Shane
State Representative

RE: If a person or entity complies with the requirements of ACA 17-95-604, would said person or entity be immune from liability for personal injury assuming that there was not gross negligence or willful or wanton misconduct on the part of the person rendering the emergency care? Q2) Under the guidelines as set forth in Act 101 of 1999 (17-95-601 et seq.) would a physician or medical authority involved with the placement of an automated external defibrillator or the person or entity that provides CPR and automated external defibrillator course training and the person or entity that provides the site where the automated external defibrillator is placed be immune from civil liability? ANSWER: The answer to these questions is "yes," assuming that the individual or entity, and the physician or other person listed in Q2 acted as an ordinary, reasonably prudent person would have acted under the same circumstances. A.C.A. 17-95-605. Whether this standard of care is met presents a question of fact.

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Opinion No.: 2003-039

Womack, Shawn
State Senator

RE:Q1) In the prolonged absence of a county judge, can a justice of the peace serving as the presiding officer appoint regular and special committees of a quorum court, subject to any procedural rules which may be adopted by ordinance? Q2) Do these regular committees and special committees remain in effect for the term of the court, or can the county judge upon his or her return reappoint these committees? Q3) If it is established that the presiding officer can appoint regular and special committees, can the justices adopt procedural guidelines to ensure equal representation for different areas of the county, such as differentiating between rural and urban areas? Q4) Does the organizational ordinance establishing procedural rules for a new term take effect immediately? Can said ordinance be passed by a majority vote, or does it require an emergency designation with 2/3rds approval? **RESPONSE:** Q1) Yes. ACA 14-14-904(d). Q2) The quorum court has the authority to determine term lengths of committee members. Q3) No. Q4) No, unless formulated as an emergency ordinance and passed in accordance with the requirements for such ordinances.

Opinion No.: 2003-040

Beard, Deborah
Account Planner, The Communications

RE:Request for approval of a proposed interlocal cooperation agreement between the Arkansas Dept of Human Services Division of Medical Services and the Memphis and Shelby County Health Department to provide early and continuous prenatal care (Campaign for Healthier Babies) for expectant mothers in the Mid Mississippi River Delta area. **RESPONSE:** Approved as submitted.

Opinion No.: 2003-041

Bradford, Jay
State Representative

RE:May a city council or a city collector assess a fee upon a defendant for the city collector to handle the collection of time pay accounts for a district court? Q2) May a district court assess a probation fee upon a defendant who is paying his/her fine out on time pay to help defer the costs of a private contractor handling collection of these fines? Q3) If assessing a probation fee to defer costs is appropriate where a private contractor is handling collections, is the collection of a probation fee for same appropriate where a city collector handles collections? Q4) If collection of a probation fee is appropriate in either instance, is there any restriction on how the probation fee is used? Q5) Who has the authority to decide where or how the probation fee, if any, is used or deposited? Q6) In the alternative, if any of the above scenarios are inappropriate, is there a way a city can designate one of its departments other than the district court to collect time pay fines and assess a charge upon the defendant for the service? Q7) If a municipal/district court judge were to enter into an agreement with a private contractor to collect time pay account and the cost of such was borne completely by defendants, would this arrangement require a contract and be subject to approval by the governing body? **RESPONSE:** The only fee that may lawfully be imposed on a defendant paying a fine in installments is the \$5.00 per month fee authorized at A.C.A. § 16-13-704(b)(1). With respect to who may collect this fee, A.C.A. § 16-13-709(2)(A) provides that a city council may designate a "city official, agency, department, or private contractor" to collect installment fines imposed by a district court.

Opinion No.: 2003-042

Higginbotham, Steve
State Senator

RE:Does the Wynne Police Department have authority to require payment of \$105 before a complaint

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can be filed with the courts? RESPONSE: No. A fee of this nature is contrary to Act 1256 of 1995 (ACA 16-10-301).

Opinion No.: 2003-043

Milligan, Jimmy "Red"
State Representative

RE:Is 911 information subject through FOI, specifically, 1) name, 2) address, and 3) telephone number? **ANSWER:** Generally, no. See Opinions 95-232, 94-120, 94-100, and 90-236 (regarding "subscriber information" under A.C.A. 12-10-317 (part of the Public Safety Communications Act). Recordings of 911 calls are, however, generally open under the FOIA (Op. 94-100).

Opinion No.: 2003-045

Eason, John
State Representative

RE:Request for reconsideration of Op. Att'y Gen. 2002-347. **RESPONSE:** Denied.

Opinion No.: 2003-046

Dangeau, LeRoy
State Representative

RE:Is S.B. 216, to authorize the trial and appellate courts to order certain cases to mediation, constitutional? **ANSWER:** Yes. Although it authorizes the court to order a dispute to mediation, it does not authorize the court to direct the parties to settle their dispute out of court. See A.C.A. 16-7-201 and 16-7-202, and Alternative Dispute Resolution Commission guidelines). Accordingly, there is no denial of due process, right to a jury trial, or violation of the "open courts" provision under Ark. Const. article 2.

Opinion No.: 2003-047

Ferguson, Danny
State Representative

RE:Under existing law, may Forrest City enter into a long term lease agreement with a private non-profit corporation (Humane Society) for property outside the city limits for the sum of one dollar (\$1.00) per year? **Q2)** If the answer to Q1 is "yes," may the city expend public funds to construct an animal shelter on this property? **RESPONSE:** The city can lease property outside the city limits for this purpose. The fact that the lease rate may be below market value is not a legal concern, assuming that the agreement is otherwise arms' length and non-fraudulent. Whether the city can expend public funds to construct the shelter depends, in part upon who will own the shelter. If the city will not own the shelter, the arrangement gives rise to concerns under Art. 12, 5 and Art. 16, 13 of the Ark. Const., but there is precedent to support an argument that the court would uphold it. If the city will own the structure, provision must be made in the agreement to protect the city's ownership interest upon expiration of the lease.

Opinion No.: 2003-048

Ledbetter, Sam
State Representative

RE:Do provisions of the Arkansas Freedom of Information Act (FOIA), codified at 25-19-101 et seq., apply to: 1) Emails between the Governor or his staff and employees of other state agencies? 2) The Governor's calendar or schedule, both as to future or past events? 3) The sign-in sheet or guest log maintained by the Governor's office in the Governor's reception area? 4) Calendars, schedules or meeting logs maintained by employees of the Governor's office? **ANSWER:** Q1) These records constitute correspondence that is exempt under 25-19-105(b)(7) when in the hands of the Governor or members of his staff. See Ops. 92-346 and 93-166. However, e-mail in the hands of other state employees is not exempt under this section. See Ops. 2002-228, 95-128, 93-166. Q2-4) Records containing this information are

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likely covered by the exemption under 105(b)(7) for “unpublished memoranda” or “working papers.” They fall squarely within the Governor’s purview as they relate to his activities and the operations of the office. See Op. 2002-228.

Opinion No.: 2003-049

Stovall, Bill H.
State Representative

RE: Can the county require alarm/security companies to purchase a permit to install their equipment when the county does not require a private citizen to purchase a permit to install similar or identical equipment? Q2) Can the county refuse to issue permits to a company if that company has a history of defective equipment or non-payment for permit and permit renewal fees? Q3) If the property owner contractually agrees to be responsible for the permit fees in the event the company fails to pay it, can a lien be placed on the property owner’s real estate? **RESPONSE:** Q1) A.C.A. § 12-10-314 makes it illegal to run a business that installs alarms that automatically dial 911 when triggered. Accordingly, I do not believe a county could permit and assess a fee on such businesses, as you suggest the proposed ordinance would attempt to do. Also, A.C.A. § 17-40-106 provides that only the Arkansas Board of Private Investigators and Private Security Agencies may require alarm service companies to obtain permits and to pay fees. Q2) Moot. Q3) Also moot. However, the county may want to consider the fact that A.C.A. § 17-40-106(c) authorizes political subdivisions by ordinance to require users of alarm systems to obtain revocable permits without a fee. Although the Code does not address the issue, I presume that frequently issuing false alarms would constitute a basis for revoking a permit.

Opinion No.: 2003-051

Pettis, William
Chair, AR State Board of Acupuncture

RE: Pursuant to provisions of S.B. 115, is it legal and/

or constitutional for a private organization to be given control of a state board by a legislative mandate? Q2) It is legal and/or constitutional to require (professional) Board members to have additional training in order to serve on the Board? Q3) Is it legal, or vague, to allow the Board to choose its own requirements to qualify for Board membership? Q4) Does the added section, 17-102-207, require presently licensed practitioners to have their licenses re-issued by the new Board? Q5) Does allowing the Board to “provide the Sec’y of State with a specific set of criteria for granting, denying and renewing each of the types of licenses” conflict with the non-amended Sec. 17-102-304, which sets standards for licensing? Should license standards be set by statute rather than by the whims of the Board? Does the amended language of ACA 17-102-302: Q6) allow people to be licensed with lower standards than are required in subsection -304? Q7) allow for an unlimited number of people to be licensed if they meet these criteria? Q8) is the entire section moot since it originally required the grandfathering standards to be met within “two years of August 1, 1997? Q9) Is there any other challengeable language contained in the amendment based on constitutionality, vagueness, equal protection or other issues? **RESPONSE:** Q1) I do not believe it would be illegal or unconstitutional for the legislature to require that members of the Arkansas State Board of Acupuncture and Related Techniques be selected from candidates recommended by the Arkansas Association on Oriental Medicine. Q2) I do not believe it would be illegal or unconstitutional to require professional board members to have specialized training. Q3) I see nothing objectionable in the legislature vesting the board with the power to require its professional members to have passed an “exam approved by the Board.” Q4) Nothing in the proposed A.C.A. § 17-102-207 suggests that a currently licensed practitioner would need to renew his license prior to the expiration of the biennial term specified at A.C.A. § 17-102-307. Q5) Although I am not certain I follow your fifth question, I see no conflict between the standards for licensing set forth at A.C.A. § 17-102-304 and a provision requiring the board to advise the Secretary of State when he should grant, deny or renew a license. Q6) I do not believe the proposed A.C.A. § 17-102-302 would offend the equal protection clause. Q7) I believe the licensing criteria might in

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theory, but would not in practice, “[a]llow for an unlimited number of people to be licensed.” Q8) I believe the only section of the proposed A.C.A. § 17-102-302 that might be described as “moot” is the one dealing with provisionally licensed practitioners, since the statute on its face requires the cancellation of all provisional licenses as of August 1, 1999. Q9) Not to my knowledge.

Opinion No.: 2003-053

McCastlain, Lona Horn
Prosecuting Attorney, 23rd Judicial District

RE: Does a prize give-away promotion whereby a local bank draws names of its customers to win, constitute an illegal gambling act under Arkansas law? **ANSWER:** This will depend upon the particular facts, with the issue focused upon the element of consideration. If the drawing involves any payment or cost that would evidence pecuniary/monetary risk of the participants, then the bank’s actions may violate both the gambling statutes ((A.C.A. 5-66-101 et seq.) and the constitutional lottery prohibition (Ark. Const. article 19, section 14). Whether there is “valuable consideration” so as to constitute a lottery, or risking of money or property (gambling) presents a question of fact.

Opinion No.: 2003-054

Emigh, Barry

RE: Request for certification of popular name and ballot title of proposed constitutional amendment authorizing bingo and raffles by nonprofit organizations, authorizing for-profit gambling as specified, empowering the General Assembly to operate lotteries, and for other purposes. **RESPONSE:** Popular name and ballot title certified as revised.

Opinion No.: 2003-056

Schulte, Susan L.
State Representative

RE: Are the two members of the expanded Cabot City Park Commission who are not required to be qualified electors of the city under ACA 14-269-202(e)(1), required to be qualified electors of the state? Q2) If the answer to Q1 is “yes,” would the answer change as it relates to a person in active duty service of the United States military? **RESPONSE:** Q1) A.C.A. § 14-269-202(e)(1), purporting to authorize a city recreation commissioner to reside outside the city, violates Ark. Const. art. 19, § 3, which provides that no individual may be elected or appointed to an office “who does not possess the qualifications of an elector.” Q2) Moot.

Opinion No.: 2003-057

Melton, Don
Director, Arkansas State Police

RE: In light of the conclusions reached in previous AG opinions, specifically Ops. Att’y Gen. 2002-141 and 99-237, that there is an exception to the expungement law for applicants for noncertified employment with a school district, can the Arkansas State Police (“ASP”) release the expunged information of an applicant or current employee to the school district upon proper request? Q2) Can the same reasoning be applied to applicants for certified positions of the school district under ACA 6-17-410 to allow State Police to release expunged conviction information? Q3) Can the same reasoning also be applied to the following laws to allow ASP to release expunged conviction information for a disqualifying offense on: Childcare workers, 9-28-409; Counselors, 17-27-313; Emergency Medical Technicians, 20-13-1106; Social Work License, 17-103-307; Care workers for the elderly, 20-33-205; Board of Nursing license, 17-87-312; Board of Examiners in Psychology, 17-97-312; Certain State

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Agencies, 21-15-103; and any other similar language which applies to the release of criminal justice information for noncriminal justice purposes by the ASP or agencies that are required by Arkansas law to obtain a criminal history report? Q4) Is that release of expunged conviction information limited to only offenses that would disqualify the subject from employment under Arkansas law? Q5) May the ASP release expunged conviction information for offenses that would disqualify the subject from employment/ licensure under state regulations or local school district regulations? Q6) If it is determined that ASP can release expunged information in certain circumstances, does ASP have a duty to supplement previously released information with expunged information that was on file at the time the initial background check request was made? Q7) If a person requests their own background check (which would not show a sealed record) and later provided that background check to an agency mentioned in the Code sections listed above, is there any way to insure that the individual does not circumvent the requirement of disclosure? Q8) Is there any legal basis under which ASP could release expunged criminal conviction information for noncriminal justice purposes? If so, in what situations? RESPONSE: Q1) Although the ASP cannot directly release to a school district a criminal background check reflecting a disqualifying expunged conviction, it can and must release this information to the Department of Education, which will then inform the district without elaboration that the applicant is ineligible. A.C.A. § 6-17-414(a). Q2) Yes, again subject to the condition that this information should be disclosed only to the Department of Education. Q3) Yes, given that each of the recited statutes contains a provision disqualifying from employment individuals who have pleaded guilty or nolo contendere to specified offenses. Q4) Although the conditions for release of expungement records are dictated by Arkansas law, in various instances among those conditions is having pleaded guilty or nolo contendere to charges under federal law or the law of another state if those charges are sufficiently similar to disqualifying offenses under Arkansas law. Q5) No, since the legislature, as opposed to administrative agencies or school districts, has itself defined which expunged

convictions will disqualify an applicant for various types of employment or licensure. Q6) The ASP is statutorily obligated to disclose clearly the fact of expunged convictions under certain circumstances. The ASP should consult with its agency counsel to determine whether it has met this obligation in any particular instance. Q7) If an expunged conviction would disqualify an applicant from employment, the prospective employer should follow the statutory procedure for obtaining the expungement information rather than accepting a report from the applicant that it knows or should know will not record expungements. Q8) The ASP should disclose the fact of expunged criminal convictions whenever a statute so provides.

Opinion No.: 2003-058

Evans, David
State Representative

RE: Does the decision rendered in *Sharp v. State*, Ark. S. Ct. Case No. 02-352, have any bearing on the definition of amusement devices as outlined in Act 1231 of 1999 (Chuck-E-Cheese law)? **ANSWER:** These issues are in litigation in the case of *State v. 26 Gaming Machines* (Sebastian Co. Cir. Ct.) An opinion cannot be rendered at this time under our policy regarding pending litigation.

Opinion No.: 2003-059

Lavery, Randy
State Senator

RE: Q1) In light of ACA 14-14-1203(d), when would the decrease in compensation for justices of the peace become effective? Q2) Would the Ark. S. Ct.'s analysis in *Farnsworth v. White County*, 851 S.W.2d 451 (1993), be applicable to justices of the peace? **RESPONSE:** Q1) ACA 14-14-1203(d) is not applicable, and the effective date will depend on whether the ordinance was enacted as an emergency ordinance. Q2) The reasoning of *Farnsworth* is not applicable to the issue in Question 1.

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Opinion No.: 2003-061

Salmon, Mary Anne
State Senator

RE: Must a county tax assessor solicit bids under ACA 14-22-102 prior to entering into a contract with a person, firm or corporation for the re-assessment of property values for county and for lowering tax purposes? **RESPONSE:** Yes. See ACD Rule 3.39. and Act 1185 of 1995 (ACA 26-26-1901 et seq).

Opinion No.: 2003-062

Altes, Denny
State Senator

RE: Can a dealer who sells police equipment install and use a blue light on his own personal vehicle? **RESPONSE:** No, unless his vehicle is "used by" a police agency.

Opinion No.: 2003-063

Clemons, Booker T.
State Representative

RE: Would one be correct in assuming that the attached Pine Bluff City Ord. No. 6036, which amends the classification of personnel in the city police department, should be considered a promotion and not a new designation (title) of an old position which would be usurping the authority of the Chief? **RESPONSE:** I am unable to determine the answer to this question from the face of the ordinance. The answer will turn on whether the city council intended to create new ranks with new and different duties, or to re-name previously existing ranks.

Opinion No.: 2003-064

Weiss, Richard
Director, DF&A

RE: Q1) What information provided by United Missouri

Bank (UMB) in the administration of its travel account contract with the State of Arkansas constitutes a public document subject to disclosure pursuant to the Arkansas Freedom of Information Act (FOIA)? Q2) If a state employee uses the Business Travel Card (BTC) for personal transactions, but pays the amount and does not seek reimbursement from the state, is the information concerning that transaction subject to disclosure pursuant to the FOIA? Q3) What documentation, if any, in the possession of the UMB would be subject to disclosure pursuant to the FOIA? **RESPONSE:** Q1) The following should be released if maintained in records by an agency subject to the FOIA: name, date, previous balance, payment, credits, purchases, debits, finance charges, new balance, amount due, agency name, amount past due, and type of transaction. The following should not be released: charge card account numbers, social security numbers, and agency identification numbers. See 25-19-105(b)(11). Q2) Yes. Q3) Records in the possession of UMB are not subject to disclosure under the FOIA. (However, under some circumstances, the state may be required to provide access to such records. See *Swaney v. Tilford*).

Opinion No.: 2003-066

Lamoureux, Michael
State Representative

RE: Q1) Is an ordinance in effect if it is passed and approved by the city council on its third reading but never published in a local newspaper? Q2) Would the answer be any different if the ordinance was never signed by the mayor and city clerk? Q3) Would the answer to Q1 be any different if the ordinance passed and approved by the city council had an emergency clause? Q4) If an ordinance is passed and approved by the city council as well as signed by the mayor and city clerk but never published in a local newspaper, could subsequent publication of the ordinance a number of years later cure any defect and put the ordinance into effect? Q5) Would the answer to Q4 be any different if the ordinance was never signed by the mayor or city clerk at the time of passage and approval by the city council, but subsequently signed by the mayor and city clerk after a period of years and

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published in a local newspaper? RESPONSE: Q1) A non-emergency ordinance cannot go into effect if it is not published, and is deemed invalid. Q2) An ordinance that is not signed as required is not valid. Q3) Emergency ordinances go into effect immediately upon passage, but cannot be fully enforced unless published within a reasonable time. Q4) No. Q5) The court would probably require that the ordinance be signed within a reasonable time.

Opinion No.: 2003-067

Hendren, Kim
State Senator

RE:In the event an Oklahoma police officer witnesses a traffic violation in Oklahoma but the vehicle does not stop until it reaches Arkansas, is the traffic stop and detention of the driver in Arkansas by the Oklahoma law enforcement officer legal? **RESPONSE:** Decline to answer because of pending litigation.

Opinion No.: 2003-069

Buttry, James A.
Attorney at Law, Friday Law Firm

RE:Request for approval of an Interlocal Cooperation Agreement between the City of Clarksville and Independence County for the sale and purchase of electric power generated at the White River Hydroelectric Power Plant. **RESPONSE:** Approved as submitted.

Opinion No.: 2003-070

Hall, John Wesley
Attorney at Law, Hall Law Firm

RE:Request for certification of the popular name and ballot title of a proposed constitutional amendment to legalize the medical use of marijuana in Arkansas. **RESPONSE:** Ballot title and popular name rejected

with no substitution due to ambiguities in the text of the measure.

Opinion No.: 2003-071

Altes, Denny
State Senator

RE:Q1) Does ACA 26-55-211 violate the prohibition of local or special acts in Ark. Const. amend. 14? Q2) Does ACA 26-55-211 violate any other provisions of the Arkansas or United States Constitutions? **RESPONSE:** It is constitutionally suspect under Am. 14 with regard to its classification between border cities on the Mississippi River and border cities on other rivers. Q2) For the same reason, it is constitutionally suspect under Art. 2, Sections 3 and 18, and under Am. 14 to the U.S. Const.

Opinion No.: 2003-072

Harper, Jeff C.
City Attorney

RE:Is the decision of the custodian of records to withhold release of letters of reprimand and/or any records of disciplinary action taken against Springdale City Code Inspectors during the past month consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** No. Although this is a close case, there is a compelling public interest in these records in light of the recent public debate about the operation of these employees' dept.

Opinion No.: 2003-073

James, Joseph Philip

RE:Was the decision of the custodian of records to withhold release of all written documentation regarding the dismissal of former Diaz Chief of Police, John Thompson, consistent with provisions of the Freedom of Information Act (FOIA)? **RESPONSE:** Probably not. All of the documents are employee evaluations

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or job performance records under the FOIA. Although the issue is finally one of fact, given the amount of time that has passed since the dismissal, I assume a final administrative resolution of the termination has occurred. Moreover, given that the city reportedly based its decision to resist disclosure based purely on the “compelling public interest” prong of the applicable test for disclosure, I gather that city officials have concluded based upon the facts that the items generated prior to the dismissal indeed formed a basis for the police chief’s termination. If so, I believe these items should be produced based upon the compelling public interest in their disclosure, subject only to the redaction of the police chief’s social security number. I believe the final document — a letter to the Arkansas Employment Security Department regarding unemployment benefits — is shielded from disclosure pursuant to ACA 11-10-314 and because it could not have served as a basis for the dismissal.

Opinion No.: 2003-074

Creekmore, Mike
State Representative

RE: Does a county quorum court have the authority to use funds collected under ACA 21-6-307 as a line item in the yearly county budget instead of separately placing the funds in an interest bearing account as specified to be used by the sheriff? Q2) If all the funds in question have not been returned to the sheriff’s office in the past, as listed in ACA 21-6-307(b) and (c), what liability is undertaken by the county and what possible legal solutions are available to correct the county being in arrears to the sheriff’s office, as this could cause a great monetary strain on the county? **ANSWER:** Q1) No, with regard to the 25% that is to be used to establish a “communications facility and equipment fund.” A.C.A. 21-6-307(b)(1)(2)(A). The quorum court has no authority over the appropriation or expenditure of these funds. See Ops. 2002-008, 95-005, 86-528. Q2) This will depend upon the particular facts, but the non-compliance would likely be noted in the audit and it might lead to a taxpayer “public funds” type of illegal exaction challenge.

Opinion No.: 2003-075

Taylor, Chaney
State Representative

RE: Are the term extension provision(s) of House Bill 2553 and Senate Bill 917, which propose to stagger the election of appeals court judges, constitutional? **RESPONSE:** In all likelihood “yes,” so long as the legislature extends the terms as little as necessary to realize the desired public policy goal of having staggered terms of office. Despite the fact that Amendment 80 sets the duration of appeals court terms at eight years, the Arkansas Supreme Court has held that the duration of a constitutionally limited term may be incidentally and reasonably modified when the legislature exercises its power to change the commencement date of terms pursuant to Ark. Const. art. 3, § 8. See *Hendricks v. Hodges*, 122 Ark. 82, 182 S.W. 538 (1916).

Opinion No.: 2003-078

Yeager, Lynda Thomas
Director, Human Resources

RE: Is the decision of the custodian of records not to release personnel or evaluation records on the grounds that there is no public interest in their release consistent with provisions of the Freedom of Information Act (FOIA)? Q2) If these records are determined to be subject to release, must each effected employee be notified of the request and that the records are subject to release? Q3) Are records of an internal affairs (IA) investigation that resulted in only a verbal counseling subject to disclosure? Q4) Is the custodian of records required to compile information when such lists/records do not exist? **ANSWER:** Q1) The records must be reevaluated under the proper tests. Q2) Yes. Q3) This will depend upon the particular surrounding facts, viewed under the applicable test for their release under the FOIA. Q4) No. As to records that do exist, the request must also be sufficiently specific for the custodian to compile the records with reasonable effort. Although, with regard to personnel or evaluation/job

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performance records, this does not necessarily require identifying particular individuals, requiring relevant time parameters may be reasonable.

Opinion No.: 2003-076

Holt, John Stephen
Chair, AR Board of Examiners

RE:Q1) Is it legal in Arkansas to change the scope of practice in psychology by removing the interviewing or administration and scoring tests such as tests of mental abilities, aptitudes, interests, and personality characteristics for such purposes as psychological evaluations, etc., as proposed by provisions of S.B. 133? Q2) S.B. 133 removes protection of the public as the purpose of licensure by removal of 104-97-104(c) from the current Chapt 97 statute. Is this legal? Q3) Is Sec. 16(c) of SB 133 legal since it allows individuals being investigated by the Board for licensure infractions or ethical problems "to select a licensed peer of equivalent qualifications to serve on the Board's panel of Claims investigation"? **RESPONSE:** Yes. Such actions do not conflict with the Ark. or federal constitutions.

Opinion No.: 2003-080

Lamoureux, Michael
State Representative

RE:What effect, if any, does the Sharp v. State decision (S.Ct. Case No. 02-352) have on ACA 26-57-404, which is part of the law that is popularly known as the "Chuck E. Cheese Law" (26-57-401 et. seq)? **ANSWER:** This issue is implicated in ongoing litigation (State v. 26 Gaming Machines, Sebastian Co. Cir. Ct), and thus cannot be answered consistent with this office's policy to refrain from issuing opinions on matters pending before the courts.

Opinion No.: 2003-087

Smith, Roger
State Representative

RE:Since ACA 24-10-607 requires that a written application be filed with the Local Police and Fire Retirement System (LOPFI) Board in order to receive a disability benefit, does the current law require a specific point in time by which the application must be made and, if so, what is that point in time? **RESPONSE:** The law doesn't specify a time for filing, but it says that the application is to be filed by "members." Only individuals who are employed are "members." The application must therefore be filed before the termination of employment.

Opinion No.: 2003-090

Hinkle, Jim
Chair, AR Game & Fish Commission

RE:Is the Governor required by law to request the advice and consent of the Senate or any other source when appointing members to the Arkansas Game and Fish Commission? **RESPONSE:** The question is a very close one and only a court could definitively answer it, but in all likelihood the appointment of Game and Fish Commissioners is subject to Senate confirmation.

Opinion No.: 2003-093

Hill, Jim
State Senator

RE:Are the Governor's appointments to the Game and Fish Commission subject to confirmation by the Arkansas Senate? **RESPONSE:** Probably. See response to Op. 2003-090.

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Opinion No.: 2003-095

Rice, Ammie E.
Contracts & Grants Specialist, DIS

RE:Is the disclosure of DIS agency employees' names, job titles, race, start dates, ages, salaries, and work status exempt under provisions of the Freedom of Information Act (FOIA)? Q2) If employee names may be withheld, is the agency still required to contact each employee individually to inform them that employee information is being disclosed? **ANSWER:** With the exception of citizenship status, records reflecting this information must be made available. See Opinions 2001-101, 98-126, 95-070, 94-198.

Opinion No.: 2003-096

Mahony, Jodie
State Representative

RE:Q1) Is the 90-day residency requirement proposed by H.B. 2302 for county officers constitutional? Q2) If the residency requirement becomes law and is challenged in a lawsuit, will the state have to defend it? If the answer to the preceding question is "yes," is it possible to insert a hold harmless provision into the bill so that the cost of defending such a lawsuit could be withheld from county turnback? **RESPONSE:** Q1) Unconstitutional as to county judges, and constitutionally suspect as to other county officers. Q2) The answer will depend on who is sued and what is alleged. A hold harmless provision of this nature does not appear on its face to be prohibited by the federal or state constitutions.

Opinion No.: 2003-097

O'Fallon, Pola
c/o Ken Ferguson, Dir of Human Resources

RE:Employee requests an appeal from an undisclosed decision regarding release of her personnel file under the Freedom of Information Act

(FOIA). **RESPONSE:** In the absence of the custodian's decision regarding release of the requested records, the opinion sets forth general guidelines that must be followed in determining what to disclose.

Opinion No.: 2003-100

Salmon, Mary Anne
State Senator

RE:Does the effective date of Amendment 80 (Jan. 1, 2005), pose jurisdictional authority questions for district judges who may be elected on city-wide authority if there is no change in the present law? Q2) Does the jurisdictional bill, SB 874, setting forth the jurisdictional limits and the method of election of district judges, meet the requirements set forth in Ark. Const. Amendment 80, Section 17? Q3) If the provisions of Amend. 80 go into effect on Jan. 1, 2005, and no law has been passed cleaning up the election and jurisdictional issues of district judges, what are the possible effects to the District Court System and the State? **ANSWER:** Q1) Yes, because the continued countywide jurisdiction of district judges who are not elected on a countywide basis will be unclear after Jan. 1, 2005, the implementation date for changes in the limited jurisdiction court system under Am. 80. See A.C.A. 16-17-206(b) (current law for municipal court countywide jurisdiction). Q2) Yes. Q.3) Uncertainty surrounding the jurisdiction issue could lead to challenges.

Opinion No.: 2003-102

Hill, Jim
State Senator

RE:Is a simple majority vote sufficient to pass Senate Bill 768, or is a three-fourths vote necessary? **RESPONSE:** A simple majority vote is sufficient. Art. 5, 38 of the Constitution does not govern, because a sales tax on tobacco products did not exist at the time of the passage of that provision (as Amendment 19) in 1934.

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Opinion No.: 2003-104

Wilkinson, Ed
State Senator

RE: Request for an opinion on the constitutionality of SB 378, regarding the recall of elected constitutional officials. **RESPONSE:** The bill is unconstitutional. The Arkansas Constitution provides a “complete scheme” for the removal of the officers subject to SB 378 and the legislature is without power to provide additional methods of removal. See *Speer v. Wood*, 128 Ark. 183, 193 SW 785 (1917). If a recall procedure is to be implemented, it must be done by constitutional amendment.



ADOPTED RULES AND REGULATIONS

ARKANSAS DEVELOPMENT FINANCE AUTHORITY

Multi-Family Housing

Docket No.: 109.04.03--001
Effective Date: 4/14/03
Contact Person: Patrick Patton
Telephone: (501) 682-5902

Final Version of the Housing Credit Program - 2003 Allocation Plan

Docket No.: 109.04.03--002
Effective Date: 4/17/03
Contact Person: Patrick Patton
Telephone: (501) 682-5902

Amended 2003 Guidelines for Allocating Multi-Family Tax Exempt Private Activity Volume Cap

Docket No.: 109.04.03--003
Effective Date: 4/17/03
Contact Person: Patrick Patton
Telephone: (501) 682-5902

Final Version of the Private Activity Volume Cap Rules and Regulations

DEPARTMENT OF COMMUNITY CORRECTION

Docket No.: 159.00.03--001
Effective Date: 4/10/03
Contact Person: Veter Howard
Telephone: (501) 682-9510

RESCINDED -- AR 8.10 - Intensive Supervision Program & AR 3.14 - Employee Conduct and Discipline

BOARD OF PUBLIC ACCOUNTANCY

Docket No.: 019.00.03--001
Effective Date: 4/21/03
Contact Person: James George
Telephone: (501) 682-5533

Rule 3.3 - Examination Educational Requirements; Rule 3.4(d) - Applications; Rule 6 - Notification of Practice under Substantial Equivalency; Rule 7.4 - Application Procedures - Forms; Rule 13.7(a) - Inactive Status

DEPARTMENT OF WORKFORCE EDUCATION

Docket No.: 172.00.03--001
Effective Date: 4/17/03
Contact Person: Peggy Wakefield
Telephone: (501) 682-1500

Adult Education Program Policies

ECONOMIC DEVELOPMENT

Docket No.: 168.00.03--001
Effective Date: 3/28/03
Contact Person: Morris Jenkins
Telephone: (501) 682-7377

ADOPTED RULES AND REGULATIONS

Emergency Rule: Consolidated Incentive Act

Docket No.: 016.14.03--002
Effective Date: 3/25/03
Contact Person: Bill Tyler
Telephone: (501) 682-9631

GAME & FISH COMMISSION

Docket No.: 002.00.03--002
Effective Date: 3/31/03
Contact Person: James Goodhart
Telephone: (501) 223-6327

2003 Spring Turkey Code Proposals; 2003 Elk Season Proposals

Emergency Rule: DHS HIPAA Policies 4001, 4004, 4005, 4006, 4007, 4008, & 4009 and Forms 4003, 4004, 4005, & 4006

Docket No.: 016.14.03--003
Effective Date: 4/14/03
Contact Person: Bill Tyler
Telephone: (501) 682-9631

HEALTH SERVICES AGENCY

Docket No.: 049.00.03--002
Effective Date: 4/10/03
Contact Person: Mary Brizzi
Telephone: (501) 661-2501

HSC Regulation 100M - Nursing Home Bed Need Methodology

Emergency Rule: HIPAA Policy 4010 and Forms 4008, 4009, 4010 and 4011

Docket No.: 016.14.03--004
Effective Date: 4/15/03
Contact Person: Bill Tyler
Telephone: (501) 682-9631

HUMAN SERVICES

Administrative Services

Docket No.: 016.14.03--001
Effective Date: 3/25/03
Contact Person: Bill Tyler
Telephone: (501) 682-9631

Emergency Rule: DHS 1083 - Document and Record Disposition

Emergency Rule: Policy 4011 - Accounting for Disclosures of Protected Health Information

Docket No.: 016.14.03--005
Effective Date: 7/1/03
Contact Person: Brenda Jackson
Telephone: (501) 682-6250

DHS Comprehensive Services Program Plan (CSPP)

ADOPTED RULES AND REGULATIONS

Child Care & Early Childhood Education

Docket No.: 016.22.03--002
Effective Date: 7/1/03
Contact Person: Ratha Turpin
Telephone: (501) 682-8590

DCC-512: Application For Child Care License/Registration

County Operations

Docket No.: 016.20.03--003
Effective Date: 5/1/03
Contact Person: Linda Greer
Telephone: (501) 682-8257

FSC 03-05 -- Implementation of Five Year Requirement for Aliens

POLLUTION CONTROL & ECOLOGY

Administration

Docket No.: 014.08.03--001
Effective Date: 4/14/03
Contact Person: Mary Leath
Telephone: (501) 682-0960

Regulation No. 9 - Permit Fee Regulations

Hazardous Waste

Docket No.: 014.09.03--001
Effective Date: 4/17/03
Contact Person: Mike Bates
Telephone: (501) 682-0960

Regulation No. 23 - Cedar Chemical Addition



INSURANCE DEPARTMENT

***** No Insurance Orders were filed with the *Arkansas Register* during the past filing period for placement in this edition.**

ORDERS AND NOTICES

LEGISLATIVE AUDIT

Agency

Period Covered

*** No Legislative Audit Orders were filed with the *Arkansas Register* during the past filing period for placement in this edition.

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